In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-37

RICHARD HOFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of having knowingly possessed goods stolen from a foreign shipment, in violation of 18 U.S.C. 659. He was sentenced to one year's imprisonment. The court of appeals affirmed without opinion (Pet. App. A1).

1. The evidence showed that on July 27, 1971, sixty-seven cartons of ladies knit pullovers, part of

a shipment from Hong Kong to New York City, were stolen from a pier in Staten Island, New York (Tr. 21; G.X. 3).[1] Each carton was valued at $147.64 (Tr. 21; G.X. 3). On August 4, 1971, F.B.I. agent Colgan went to Glow Distributors in Manhattan. He informed petitioner that he had a search warrant for Room 501, 49 West 27th Street, located about 100 yards around the corner from Glow Distributors, and asked petitioner if he had a key to the room (Tr. 10-11). Petitioner said that he did not have a key and that he had no knowledge of the room (Tr. 11). A locksmith opened the door to Room 501 and agent Colgan found and seized numerous cartons of merchandise including 11 cartons of the stolen pullovers and 38 cartons containing stolen flashlights (Tr. 13-15).

The manager of the building, Robert Cohen, testified that petitioner and his brother had previously asked him whether he had some place they could rent for warehousing merchandise (Tr. 22-23). Cohen had showed them Room 501, and, after they agreed that the room met their needs, Cohen had prepared a lease application dated February 24, 1971, based on information supplied by petitioner (Tr. 23-24). Petitioner at that time told Cohen to put down the name of Peter Gordon as lessee and gave 170 West 78th Street, New York City, as Gordon's address (Tr. 25; G.X. 4). The rental agent for the building located at 170 West 78th Street testified that no one named

[1] "Tr." refers to the trial transcript, which we are filing with the Clerk of this Court. "G.X." refers to the government's exhibits.

Peter Gordon lived there during the entire calendar year 1971 (Tr. 36).

After Cohen prepared the lease for Room 501, he delivered it to petitioner or petitioner's brother at the "Glow store" (Tr. 27). The lease was returned to Cohen signed "Peter Gordon," together with payment in cash for the security and a month's rent, less a deposit of $100 previously paid to Cohen by petitioner (Tr. 26-28). The lease indicated that the room would be used for the storage and shipping of radios and clothing (Tr. 28-29; G.X. 6). Each month from March to July 1971, Cohen collected the rent for Room 501 from petitioner or petitioner's brother and it was always paid in cash (Tr. 29). Cohen never dealt with or met anyone named Peter Gordon (Tr. 30).

A locksmith, Arthur Gatling, testified that in February 1971 he was sent to Glow Distributors where petitioner told him that he wanted a lock installed in Room 501 (Tr. 37-38). After Gatling installed the lock, he gave the keys to petitioner who paid him for this work (Tr. 37-41).

Also introduced into evidence was petitioner's grand jury testimony, dated September 30, 1971, denying that he had rented any space at 49 West 27th Street, denying any knowledge of a room at that address, denying that a lock had been installed in Room 501, denying that he paid rent on Room 501, denying that he knew Robert Cohen, and denying that he used the name "Peter Gordon" (Tr. 45; G.X. 8).

Petitioner testified at trial that he did not rent space at 49 West 27th Street, but that a person whom

he knew as Peter Gordon came to him in February 1971 and asked about space available for rent. Petitioner looked for the space, talked to an agent and gave the agent $100 as a deposit on a loft. Petitioner agreed with Gordon to pay the rent on the loft and to deduct the rent from money he owed Gordon for merchandise. Petitioner claimed that he gave the lease to Gordon. With respect to the lock installation, petitioner testified that Gordon requested that the lock be installed. Petitioner took care of the installation and gave the keys to Gordon. Petitioner was unable to provide Gordon's address or telephone number (Tr. 52-69).

Norman Brill, a local merchant, testified that he met a person named Peter Gordon and had spoken to him on two occasions in February and March or April 1971 (Tr. 92-93). On the second occasion, Brill testified that Gordon said he had a loft in the neighborhood (Tr. 93-94).

2. At the trial the government attempted to introduce the stolen flashlights as evidence of similar acts (Tr. 15-17; G.X. 2). The trial court sustained petitioner's objection to this evidence, stating that "[i]f [the prosecutor] thought they were stolen, [he] should have indicted [petitioner] for them at the same time. This is not a prior similar act" (Tr. 16-17). Later in the trial, the government called a retired United States Customs Officer to testify as to a prior similar act involving petitioner (Tr. 46). The officer gave only his name and former occupation before petitioner objected and requested an offer of proof (Tr.

46-47). At the side bar, out of the hearing of the jury, the government explained that the testimony of the former customs officer and subsequent witnesses would establish that approximately ten months before the crime charged in the instant indictment, a large quantity of stolen merchandise was found in petitioner's store (Tr. 47-48). The court sustained petitioner's objection to this proffered testimony after being informed that the grand jury had declined to indict petitioner for this act (Tr. 48-49).

Petitioner contends that these offers of proof were highly prejudicial and deprived him of a fair trial (Pet. 5). The trial court, however, upheld petitioner's objection to this proof and excluded all evidence of similar acts. In its charge, it instructed the jury to disregard questions and allegations as to facts contained in questions to which the court had sustained objections (Tr. 149). Moreover, on this record the testimony of the former customs officer was unenlightening to the jury on the matter of the commission of another crime. Under these circumstances petitioner was not prejudiced by the government's offers of proof of similar acts.

3. The jury retired at 11:57 a.m. to deliberate (Tr. 154). At 4:05 p.m. the jury reported that it was unable to reach a verdict (Tr. 156). The court then gave the jury a modified "Allen Charge," set forth at Pet. 20-21 (Tr. 156-157). At 4:20 p.m. the jury returned to the juryroom to continue its deliberations, and at 6:50 p.m. it returned a verdict of guilty (Tr. 157-159).

Petitioner contends that the supplemental instructions were prejudicial and coercive (Pet. 19). The instructions given by the trial judge, however, emphasized that no juror was expected to yield a conscientious conviction (Tr. 157), and that it was their duty to agree upon a verdict only if they could do so without violating their individual judgment and conscience (Tr. 157). See *United States* v. *Meyers*, 410 F.2d 693 (C.A. 2), certiorari denied, 396 U.S. 835. Moreover, the supplemental instruction was not coercive in effect, as evidenced by the jury's continued failure to agree on a verdict for another two and one-half hours. See *Meyers, supra.* The poll of the jurors confirmed that each juror in his own right determined that petitioner was guilty (Tr. 159).

This Court has consistently declined to review recent decisions in the various circuits regarding the propriety of a supplemental instruction to juries experiencing difficulty in reaching a verdict. Although several circuits, including the Second, have recently determined, under their supervisory authority, that the traditional *Allen* instruction (*Allen* v. *United States*, 164 U.S. 492) should be modified or eliminated in the future,[2] no court of appeals has held that such a supplemental instruction is *per se* coercive or constitutes reversible error.

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[2] See, *e.g.*, *United States* v. *Fioravanti*, 412 F. 2d 407 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837; *United States* v. *Brown*, 411 F. 2d 930 (C.A. 7), certiorari denied, 396 U.S. 1017; also see *United States* v. *Thomas*, 449 F. 2d 1177 (C.A. D.C.) (*en banc*). The instructions in this case follow those approved by the Second Cir-

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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cuit. See *United States* v. *Barash*, 412 F. 2d 26, certiorari denied, 396 U.S. 832; *United States* v. *Bowles*, 428 F. 2d 592, certiorari denied, 400 U.S. 928; *United States* v. *Hynes*, 424 F. 2d 754, certiorari denied, 399 U.S. 933; *Meyers, supra.*

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